December 12, 1997

MEDIA ACCESS PROJECT

Magalie Roman-Salas
Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, DC 20554

RE: Notice of *Ex Parte Presentation* in MM Docket 93-25

Dear Ms. Salas:

On December 12, 1997, a written *ex parte* presentation was provided to Deputy International Bureau Chief Rosalee Chiara, Associate International Bureau Chief Mindy Ginsberg, and International Bureau Attorney-Advisor Brian Carter.

The presentation consisted of the submission of a law review article: Mark Nadel, *Editorial Freedom: Editors, Retailersm and Access to the Mass Media,* 9 COMM/ENT Law Journal 213 (1986).

Two copies of the submission, including its attachment, are It will be of assistance with respect to editorial control issues which must be resolved in the Commission's implementation of Section 25 of the 1992 Cable Act.

Sincerely,

Andrew Jay Schwartzman
President and CEO

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December 12, 1997

MEDIA ACCESS PROJECT

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RE: MM Docket 93-25
Ex Parte Presentation
[Two Copies Submitted to the Secretary, FCC]

Dear Rosalee, Mindy and Brian:

Gigi has asked me to share with you the attached article [Mark Nadel, *Editorial Freedom: Editors, Retailers, and Access to the Mass Media,* 9 COMM/ENT Law Journal 213(1986)]. It will be of assistance with respect to editorial control issues which must be resolved in the Commission's implementation of Section 25 of the 1992 Cable Act.

Sincerely,

Andrew Jay Schwartzman
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Editorial Freedom: Editors, Retailers, and Access to the Mass Media

by MARK S. NADEL*

I
Introduction

Courts have long recognized that the freedom of the press guaranteed by the first amendment protects the right to disseminate messages[1] and includes a guarantee of "editorial discretion" or "freedom."[2] Yet, no court has ever articulated precisely which aspects of the communications process fall within the scope of "editorial freedom."[3] The problems that stem from this ambiguity are nowhere more apparent than when cable television operators oppose government intrusion into their decisionmaking by invoking their rights of editorial freedom. In particular, cable operators have claimed that, under the protective umbrella of the first amendment, they possess both the right to transmit those messages they please and the right to refuse to present those messages they find displeasing, for whatever reason.[4]

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* Analyst, Office of Technology Assessment, U.S. Congress. This article was written before the author took his present position, and it reflects solely his own opinions, not those of OTA. B.A., Amherst College, 1978; J.D., Harvard University, 1981. The author would like to thank Andrew Bernstein, Jonina Duker, Eugene Nadel, Eli Noam, and Carl Oppedahl for their helpful comments on earlier drafts of this article.

1. First amendment freedom of expression protects the right to disseminate messages irrespective of the identity of the speaker. Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 106 S. Ct. 903, 907 (1986). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-2 to 12-33, at 580-731 (1978).

2. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) and *infra* text accompanying notes 38-56.

3. *See infra* text accompanying notes 61-64.

4. For example, in opposing regulations which require cable operators to grant access to their systems, cable operators have relied on Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), to argue that these rules abridge their editorial freedom. *See* G. SHAPIRO, P. KURLAND & J. MERCURIO, CABLESPEECH 123 (1983) [hereinafter SHAPIRO]; Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867, 918-19 n.215 (1983); *See generally* Goldberg, Ross & Spector, *Cable Television, Government Regulation, and the First Amendment*, 3 COMM/ENT L.J. 577 (1981) [hereinafter Goldberg]. Counsels for media entities often try to use the first amendment right of editorial freedom as a shield against any government regulation of the media,

v. 9 Comm/Ent (1986)

scholars have articulated the need for an effective right of access to the privately controlled mass media in order to maintain the open communications sought by the founding fathers. In a 1967 article, Jerome Barron argued that the first amendment supports a right of access to the print media;[31] however, this idea has failed to gain wide acceptance.[32] In the broadcast medium, development of the "fairness" doctrine[33] was seen as a means of assuring a diversity of points of view. Yet, in recent years, scholars have become disillusioned with the doctrine, believing that it chills the expression of broadcasters to an unconstitutional degree.[34]

Many public policy analysts who studied the issue in the 1970s began to believe that cable television would resolve the access problem. With its virtually unlimited channel capacity,[35] cable increased the possibility that the government could refrain from regulating other more scarce media resources, especially broadcasting. A 1971 report by the Sloan Commission on Cable Communications[36] concluded that cable television represented an abundant new resource which could serve the needs of everyone. Many of the major cable studies of the 1970s suggested that private cable television systems should be required to serve public policy goals by acting as passive carriers for the

may restrict freedom of expression. *See* F. ROWAN, BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS 90 (1984).

31. *See* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1667-69 (1967).

32. This idea has gained some support, however. *See* infra note 53.

33. *See generally* Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, FCC 85-459, 58 Rad. Reg. 2d. (P&F) 1337, 102 F.C.C. 2d 143 (1985) (discussing the effects of recent developments on the doctrine); SHAPIRO, *supra* note 4, at 0-54 (1983). This discussion of the fairness doctrine is introduced here to demonstrate growing concern over the need for access to the media. However, the broadcast medium has historically been seen as being in a unique regulatory posture because it uses the electromagnetic spectrum — a scarce resource. *See* Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). Although the fairness doctrine technically applies to cable, in practice it has never been applied. In fact, the FCC is reconsidering the justification for applying these rules to cable and exploring possible alternatives. Fairness Doctrine and Political Cablecasting Requirements, Notice of Proposed Rule Making, M.M. Docket 83-130 (1983). However, the Commission is unlikely to change its position.

34. *Id.*

35. Although a single coaxial cable might only be able to carry twelve, twenty-four, or fifty-four television channels, a cable system owner could construct a system with two, three, or more cables. The only constraints are economic: consumer demand and construction costs.

36. SLOAN COMMISSION OF CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE (1971) [hereinafter SLOAN].

programming of others on at least some of the systems' channels.[37]

2. *The First Amendment and the Right to Exclude*

While governments and others saw cable as a valuable public resource, cable television system owners did not want to relinquish any control over access to their media. Even if the fifth amendment did not prohibit the government from interfering with their private property right to exclude, cable owners reasoned that perhaps the first amendment would do so. Relying primarily on *Miami Herald Publishing Co. v. Tornillo*,[38] the cable television industry responded to access rules by asserting that regulations requiring them to grant others access to their medium abridged their editorial freedom.[39]

In *Tornillo*, the Supreme Court held that Florida's right-of-reply statute violated the first amendment because it interfered with the editorial discretion exercised by editors. That statute provided that if a newspaper assailed a candidate's character or record, the candidate could demand that the newspaper print a reply of equal prominence and space. As the Court explained later,[40] the Florida statute "exact[ed] a penalty on the basis of the content of a newspaper,"[41] and thus there was a danger that the statute would "dampe[n] the vigor and limi[t] the variety of public debate."[42] The Court's unanimous decision concluded that "[i]t has yet to be demonstrated how governmental regulation . . . can be exercised consistent with First Amendment guarantees. . . ."[43]

Cable owners interpreted *Tornillo* as prohibiting the government from imposing any right of access to any communications medium, asserting that any such access right would necessarily intrude into the role of editors.[44] Cable television system owners used this argument successfully when they challenged the governmental regulations requiring them to retransmit the

37. *See* Nadel, *Cablespeech for Whom?* 4 CARDOZO ARTS & ENT. L.J. 51, 70 n.104 (1985).

38. 418 U.S. 241 (1974).

39. *See supra* note 4.

40. The *Tornillo* decision was distinguished and explained by the Court in PruneYard Shopping Center v. Robins, 447 U.S. 74, 88 (1980).

41. *PruneYard*, 447 U.S. at 88 (quoting *Tornillo*, 418 U.S. at 256).

42. *PruneYard*, 447 U.S. at 88 (quoting *Tornillo*, 418 U.S. at 257).

43. *Tornillo*, 418 U.S. at 258.

44. *See supra* note 4.

signals of local off-air television broadcast stations.[45] In addition, they have asserted it in litigation involving exclusive cable television franchises[46] and public access cable channels,[47] discussed in some detail below.[48]

The 1986 Supreme Court decision in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*[49] may lend support to the cable industry position. That case involved a California Public Utilities Commission (PUC) decision which required the plaintiff utility to include the editorial material of an opposition group in a number of the PUC's billing envelopes.[50] Although the plurality opinion relied most heavily on the first amendment's freedom of expression and a finding of content-based discrimination,[51] the opinion offered a broad interpretation of *Tornillo*, reiterating that a "[g]overnment enforced right of access *inescapably* 'dampens the vigor and limits the variety of public debate.' "[52]

Nevertheless, many commentators have suggested that *Tornillo* be interpreted more narrowly.[53] In spite of *Tornillo* and its progeny, rights of access have been upheld by the Supreme Court in a number of other contexts where they have been found not to dampen the vigor or limit the variety of public debate. In *PruneYard Shopping Center v. Robins*,[54] the Court held that the state of California could interpret its own constitution to require the owner of a private shopping center

45. *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452-53 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986).

46. *See* Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1406-07 (9th Cir. 1985), *remanded*, 106 S. Ct. 2034 (1986).

47. *See* Berkshire Cablevision of R.I. v. Burke, 571 F. Supp. 976, 982-86 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

48. *See infra* text accompanying notes 165-74 & 130-39, respectively.

49. 106 S. Ct. 903 (1986).

50. *Id.* at 914.

51. *Id.* at 910-12.

52. *Id.* at 908 (quoting *Tornillo*, 418 U.S. at 257) (emphasis in original).

53. *See* F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 334 (1981); M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 4.09(D)(2)(c), 4-132 to 4-134 (1984); B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 12-14 (1976); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 627-28; Nadel, *Electrifying the First Amendment*, 5 CARDOZO L. REV. 531, 536 (1984). *See also* Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 FED. COMM. L.J. 215, 222-23 (1979). Others, like Harvard Law School professors Archibald Cox and Laurence Tribe, go even further, believing that the *Tornillo* decision should have been decided against the media owner. (Personal conversations, Spring, 1981).

54. 447 U.S. 74 (1980).

to open his forum to leafletters.[55] A year later, in *CBS, Inc. v. FCC*,[56] the Court upheld a statute granting political candidates access to broadcast stations against a challenge based on editorial discretion. In neither case did the Court express the concern that the access rules would dampen the vigor of public debate.

Interpreting the first amendment as protecting the right to exclude persons from gaining access to a cable system would essentially turn the amendment on its head. A right to exclude messages completely could enable private media owners to suppress messages of which they disapproved. The goal of the marketplace would thus be thwarted. The right of the property owner to exclude others where the property in question is a medium of mass communications may be regulated just like any other property.[57] As long as the governmentally-required access does not rise to the level of becoming a "taking" under the fifth amendment, or is compensated by the government or the party granted access, the fifth amendment is not infringed.[58]

In such a case, the social goal of facilitating open communication outweighs the private property right of the individual media owner.[59] While the first amendment prohibits the *suppression* of messages by the government, it should not be read as prohibiting the government from *promoting* communication consistent with the first amendment through carefully crafted rules that permit individuals to gain occasional access to the most economically efficient mass media.[60] Those individuals who are willing to pay the market rate for access to the mass media should not be left to the mercy of large media owners who could suppress ideas by refusing to disseminate them.

Against this background, it is unclear which aspects of the editorial discretion exercised by cable television system owners are protected by the first amendment. Courts have failed to articulate the boundaries of editorial freedom. In fact, in *Pre-*

55. *Id.*

56. 453 U.S. 367 (1981).

57. Regulations could be justified by the strong governmental interest in facilitating wide-open communication. *PruneYard*, 447 U.S. at 87.

58. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

59. *PruneYard*, 447 U.S. at 82-83.

60. *See* Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, *passim* (1981).

ferred Communications v. City of Los Angeles,[61] *Quincy Cable TV v. FCC*,[62] and *Berkshire v. Burke*,[63] discussed in more detail below,[64] the Supreme Court and three courts of appeals either sidestepped the editorial discretion issue, or simply assumed that a regulation interfered with the freedom without explaining why. The need for a workable definition of editorial freedom is thus of growing importance.

B. Editorial Freedom and the Right to Receive Information

The right to receive information has been recognized by the Supreme Court as a paramount aspect of the first amendment. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council*,[65] the Supreme Court said, "Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both."[66] Most recently, in *Pacific Gas & Electric v. California Public Utilities Commission*,[67] the Court added that "[t]he constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. . . . [T]he First Amendment protects the public's interest in receiving information."[68]

These positions of the Court followed directly from two prior important first amendment cases. In *Time Inc. v. Hill*,[69] the Court recognized that "[the first amendment] guarantees are not for the benefit of the press so much as for the benefit of all of us."[70] In the seminal case of *Red Lion Broadcasting Co. v. FCC*,[71] the Court emphasized, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[72] As first amendment absolutist Justice William Douglas noted, "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to

61. 754 F.2d 1396 (9th Cir. 1985), *remanded*, 106 S. Ct. 2034.
62. 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986).
63. 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).
64. *See infra* text accompanying notes 165-71, 109-13 & 132, respectively.
65. 425 U.S. 748 (1976).
66. *Id.* at 756.
67. 106 S. Ct. 903 (1986).
68. *Id.* at 907.
69. 385 U.S. 374 (1966).
70. *Id.* at 389.
71. 395 U.S. 367 (1969).
72. *Id.* at 390.

the public's right to know."[73]

One might regard the right to receive information as the demand side of the first amendment, where the general right to disseminate information represents the supply side. This article contends that the first amendment protects editorial freedom as part of its demand side. In protecting a consumer's right to receive information, the first amendment protects a consumer's right to receive information *effectively*. The first amendment must therefore protect the right of consumers to utilize the editorial services they desire. Any government regulations that interfere with an editor's ability to provide services which enhance a consumer's ability to receive information, or which make the provision of editorial services economically burdensome to provide, abridge the editorial discretion protected by the first amendment. The following section presents the basis for this thesis and examines the specific editorial services that editors provide.

II
Retailers and Editors

A. The Need for Editors

To determine which aspects of the editorial process the first amendment should protect as part of editorial freedom, it is important to understand the role editors play in society. Individuals need editors because more messages are produced than any single individual can possibly see or hear.[74] Millions of news articles, tens of thousands of feature stories, and thousands of books are written annually.[75] Multitudes of new television programs and motion pictures are produced and distributed.[76] As one commentator has observed:

> We are drowning in information . . . . Some [s]cientists

73. Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting). For a more detailed discussion of this right, see generally Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1 (1976); Note, *The Right to Receive Information and Ideas Willingly Offered: First Amendment Protection for the Communication Process*, 1 CARDOZO L. REV. 497 (1979).

74. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975). According to psychologists, the human mind would be overwhelmed with the abundance of stimuli with which we come in contact if the brain did not develop internal editing "schemas" to decide what to perceive and what to ignore. D. GOLEMAN, VITAL LIES, SIMPLE TRUTHS 79-82 (1985).

75. *See, e.g.*, WHO OWNS THE MEDIA (B. Compaine ed. 1983).

76. *Id.*

> [even] . . . complain of information pollution and charge that it takes less time to do an experiment than to find out whether or not it has already been done. . . . If users . . . can locate the information they need, they will pay for it. The emphasis of the whole information society shifts, then, from supply to *selection*.[77]

Without the help of editors, consumers simply could not sort through the millions of items of information produced daily. The editors of *U.S. News & World Report* capture the point in their advertising: "With US News anything worth missing is already missing," and "We give you the cream. Not the skim."[78]

The consumer's task of selecting among messages is similar to the process of searching or shopping for other types of goods or services in our society. Whenever there are large numbers of items differing in price and quality, a consumer must make subjective judgments about what to buy.[79] Yet individuals do not have enough time or money to evaluate the price and quality of every available choice for every purchase they make.[80] Therefore, even those consumers who are only moderately particular in their preferences must still seek some source of information about the offerings.

The most common sources of such information are prior experience,[81] advertising,[82] peers, and experts.[83] However, at various times and for a variety of reasons, these sources may not provide adequate assistance. In such situations, consumers may rely on the explicit or implicit decisions and recommendations of the *retailers* serving the particular market.[84]

77. J. NAISBITT, MEGATRENDS: TEN NEW DIRECTIONS TRANSFORMING OUR LIVES 24 (1982) (emphasis in original). *See also* Owen, *The Role of Print in an Electronic Society*, in COMMUNICATIONS FOR TOMORROW: POLICY PERSPECTIVES FOR THE 1980'S 230 (G. Robinson ed. 1978):

> A second feature of the print media is that they typically supply a high level of editorial service. That is, people are willing to pay something to avoid the task of sifting data for themselves and editors compete for the readership market by compiling packages that suit the tastes of individuals. Indeed, in the Age of Information, editors assume an even greater importance; people will pay *not* to be deluged with unedited data.

Id. at 230.

78. *See, e.g.*, ADVERTISING AGE, Sept. 10, 1984, at 19.

79. *See, e.g.*, Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 224 (1961). Furthermore, that choice is becoming ever more difficult. *See, e.g.*, Belkin, *Shopping Is Getting Much More Complicated*, N.Y. Times, Aug. 8, 1985, at A1, col. 1:

> There are nearly 300 long-distance telephone companies in the United States today, and 23 kinds of Nine Lives cat food. Revlon makes 157 shades of lipstick (41 of them pink) and Tower Video offers 5,000 video cassettes for sale or rent. The Love drugstore chain carries 41 varieties of hair mousse.

80. Search is expensive. *See* J. ENGEL, D. KOLLAT & R. BLACKWELL, CONSUMER BEHAVIOR 238 (3d ed. 1982) [hereinafter J. ENGEL]; M. PORTER, INTERBRAND CHOICE, STRATEGY, AND BILATERAL MARKET POWER 20-22, 101-04 (1976).

81. *See* J. ENGEL *supra* note 80, at 239; M. PORTER *supra* note 80 at 99, 110-11; P. Kotter, Marketing Management 482-87 (5th ed. 1984). If they could not depend on brand loyalty, even the best producers could find it difficult to sell their high quality products. The acclaimed novelist Doris Lessing demonstrated the impact of prior experience in the media when two novels she wrote under a pseudonym were rejected even by her longtime British publisher. *See* McDowell, *Doris Lessing Says She Used Pen Name to Show New Writers' Difficulties*, N.Y. Times, Sept. 23, 1984, § 1, at 45, col. 1.

82. *See* M. PORTER *supra* note 80, at 235-37; F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 376-80 (2d ed. 1980). *See also* Bates v. State Bar of Az., 433 U.S. 350, 364 (1977) ("The consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue").

83. Consumers often seek advice from family or friends who have personal experience with the product or rely on the opinions of others, particularly those with similar needs or tastes. *See* M. PORTER, *supra* note 80, at 99-100; J. ENGEL, *supra*, note 80, at 278-81. Frequently, valuable assistance is also available from the expert critics who exist in almost every product market. *See* Eovaldi, *The Market For Consumer Product Evaluations: An Analysis and a Proposal*, 79 NW. U.L. REV. 1235, 1237-39 (1985).

84. *See* M. PORTER, *supra* note 80, at 21-22.

85. One writer has identified retailers with knowledge of their products as being in the "nonconvenience goods" business. Those offering little information to consumers and carrying primarily well-advertised brand name products are identified as being in the "convenience goods" business. M. PORTER, *supra* note 80, at 136.

86. This is not surprising when one observes that the verb edit is derived from the Latin word *edere*, meaning to put forth. WEBSTER'S NEW INTERNATIONAL DICTIONARY 817 (2d ed. 1956).

87. *See* E. DENNIS & J. MERRILL, BASIC ISSUES IN MASS COMMUNICATION 138, 139 (1984) (identifying a marketing approach as the most effective way to select news of interest to the audience). "For as long as anyone can remember, editors . . . have decided what will grace the pages of newspapers or appear on newscasts and what will

B. The Services Provided by Retailers and Editors

Using information from competing suppliers and feedback from their customers, retailers are generally knowledgeable about the products they offer for sale.[85] As a result, they are able to provide consumers with many valuable services. These services, discussed below, can be placed into three categories: (1) searching, gathering, and specializing; (2) evaluating, labeling, and screening; and (3) organizing.

Editors, in effect, act as retailers of messages,[86] performing these same services when they select from among the multitude of available messages the relatively few with which to compose a magazine, radio program, film festival, library, or high school history curriculum.[87] Since consumers of informa-

tion need these editorial services to receive information effectively, the first amendment must protect editors' ability to provide them.

As shown below, the ability to exclude completely is not critical to either the retail or editorial process. Indeed, the right to exclude is positively disfavored in the editorial process, since by excluding, the editor is suppressing communication by, and to, others. Both editors and retailers provide a highly valued screening service to those who desire it, but that service can, and often is, provided without excluding and suppressing items that other consumers might desire. This is achieved by the use of a number of creative alternatives—in particular, labeling less desirable items as less desirable.

1. *Searching, Gathering and Specializing*

Most retailers begin by searching in their chosen product market for those items which appeal to a particular target audience. They then gather the selected items together in some convenient location.[88]

A retailer may try to serve everyone in a particular geographic market by offering a standard selection of products which are at least minimally satisfactory to almost everyone in that market. Thus, the owner of the only clothing store in a community often finds it most profitable to offer a standard selection of items. Similarly, the only doctor or lawyer in a small town is normally a general practitioner. Even when a retailer is not the sole provider in a market, but is the second or third retailer entering the field, he or she may still find it most profitable to serve the mass market.[89]

In other instances, however, a retailer will find it more profitable to specialize by focusing on a narrow target audience.[90] By specializing, a retailer can concentrate on gathering items of

not. They have engaged in a hard selection process, elevating some items to importance and public exposure while relegating others to the wastebasket." *Id.* at 139.

88. *See* J. ENGEL, *supra* note 80, at 43.

89. *See* Wildman & Owen, *Program Competition, Diversity, and Multichannel Bundling in the New Video Industry*, in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS AND TECHNOLOGY 244 (E. Noam ed. 1985).

90. *See* M. PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS 38-40 (1980). The strategy is also called segmentation. *See* J. MASON & M. MAYER, MODERN RETAILING THEORY AND PRACTICE 134 (1978) ("Segmentation involves subdividing the market and then tailoring products and/or messages for all or a subset of the segments thus identified"). *See also* P. KOTTER, *supra* note 81, at 250-76.

interest for those with specialized tastes and can offer more variations on their favorite themes.[91] Specialization permits consumers to receive superior service for their specialized needs.

While specialists might exclude items that do not fit their image, the need to exclude such items is neither necessary nor very important to the retail service. This is because retailers can generally expand to carry as much inventory as they find it profitable to sell.[92] If they have sufficient space, they need not exclude one profitable product to make room for another; both can be carried. While expansion at a given location might often be extremely difficult, such expansion is usually possible if it is justified by the prices received for the goods sold in the added space.

Media editors operate in a similar fashion. The only newspaper in a town generally tries to offer something for everyone and to avoid offending any one group, advertisers in particular.[93] However, when many competitors can be supported, as is

91. *See, e.g.*, Hopkins, *Born to Shop*, NEW YORK MAGAZINE 42, 44 (June 16, 1986). (" 'Barney's just got too popular too fast,' he complains. 'They edit too much for my taste. I want to do my own editing of the designers.' "); Kanner, *Toying Around: F.A.O. Goes Shopping*, NEW YORK MAGAZINE 22 (Mar. 9, 1987) ("We edit for our customers").

92. If expansion is sufficiently profitable to permit the retailer to pay the cost of constructing or leasing additional space from neighbors, and still leave some money left over, then a normal profit maximizing retailer is likely to expand to raise profits.

93. In the newspaper industry this strategy was first pursued by the penny press publishers who "positioned their products toward the great masses of the community .... [T]he penny press also welcomed all advertisers as contributing to the new democratic spirit." J. TUROW, MEDIA INDUSTRIES: THE PRODUCTION OF NEWS AND ENTERTAINMENT 120-21 (1984).

As the late communications professor Ithiel de Sola Pool observed:

> Newspapers, as they moved into the status of monopolies, had the wisdom to defuse hostility by acting in many respects like a common carrier. .... [Today] they not only run columnists of opposite tendency and open their local news pages willingly to community groups, but also encourage letters to the editor. Most important of all, they accept advertising for pay from anyone. Only rarely does a newspaper refuse an ad on grounds of disagreement.

I. POOL, *supra* note 27 at 238. *See also* I. POOL, *id.* at 19; P. SANDMAN, D. RUBIN & D. SACHSMAN, MEDIA: AN INTRODUCTORY ANALYSIS OF AMERICAN MASS COMMUNICATIONS 104, 137-48 (3d ed. 1982).

Even where there are three major competitors, the commercial television networks compete for the mass market, therefore offering "lowest common denominator" programs. *See* 1 NETWORK INQUIRY SPECIAL STAFF, FINAL REPORT: NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 35 (1980).

> In advertiser-supported television, since payments by advertisers are based solely on the number and characteristics of viewers attracted to a program, there may be a tendency for an excessive "sameness" of programs, especially

the case with national magazines, theaters, book stores, and radio stations in large cities, increasing degrees of specialization are possible.[94] By providing dozens of competing video channels, cable television has spawned the development of many specialized cable networks.[95]

In radio and television broadcasting, the right to exclude is important to the ability to specialize, because the products a station can offer are limited to those which will fit into a twenty-four hour day. However, in the print and cable media, where capacity is not so limited,[96] specialization can occur without a right to exclude. Thus, there is no reason for cable or print editors to exclude information where it is not unprofitable because there is no limit on the amount of pages or channels being used.

Thus, it is extremely rare for print publications to refuse a timely advertisement due to a lack of space. The publication can simply add pages as long as the price charged to the advertiser earns the publisher a profit. Although it is somewhat more complicated and time-consuming for a cable television system owner to add additional channels, such expansion can always be undertaken if the user is willing to cover the cost of the capacity.

2. *Evaluating, Labeling, and Screening*

Some consumers are content once the retailer has gathered his or her products into a single location,[97] but most expect additional service. They depend on the retailer to evaluate the quality of each product that might be offered. Retailers provide this service in the way they handle potentially dangerous products, establish quality standards, and endorse particular products. By carefully identifying products, retailers can enable consumers to avoid unwanted products without entirely excluding products that others may find desirable.

(a) *Potentially Offensive Products*

Retailers provide a preliminary screening service by identifying dangerous or potentially offensive products. In some product markets the government also provides this service by requiring warnings to be placed on specific products. While such products may be excluded by some retailers or the government,[98] labeling permits the potentially offensive or dangerous products to remain available to those consumers who want them, while enabling those who prefer to avoid them to do so. In addition, retailers will offer them if consumers are willing to make it profitable for them to do so.

Editors provide a similar service. Instead of excluding all adult films, theater owners can provide consumers with comparable protection through screening and rating films.[99] Some

when the number of networks and stations is small. The most profitable policy for each of a small number of networks may be to attempt to capture a share of the mass audience by "duplicating" each of the others' programming, i.e., by providing programs very similar to those shown by the others.

Id. *See also The Vast Wasteland*, address by Newton N. Minow, then FCC Chairman, to the National Association of Broadcasters (May 9, 1961), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 281 (F. Kahn ed. 1978). Former NBC executive Paul Klein has suggested that lowest common denominator programming occurs because the networks recognize that television viewers will usually watch the program they are tuned to unless they find it objectionable. Therefore, they try to provide the least objectionable programming they can. Klein, *The Television Audience and Program Mediocrity*, in MASS MEDIA AND SOCIETY 74-77 (A. Wells ed. 1979).

94. As the FCC has observed about the radio medium:

> [I]n the early days of radio, it was essential that a few stations provide a broad general service. Today, however, it has become essential in view of the proliferation of radio stations and other broadcast services that radio licensees specialize to attract an audience so that they may remain financially viable.

Deregulation of Radio, Report and Order, 84 F.C.C.2d 968, para. 2 (1981) (*cited in* United Church of Christ v. FCC, 707 F.2d 1413, 1434 (D.C.Cir. 1983)). *See also* J. Barron, *Specialty Bookshops: A Browser's Guide*, N.Y. Times, Apr. 27, 1984, at C1, col. 2. In New York City, there are enough legitimate theaters to lead them to specialize.

95. There are now networks devoted solely to movies (e.g., Home Box Office (HBO)), news (Cable News Network (CNN)), congressional debate (Cable Satellite Public Affairs Network (C-SPAN)), and even separate networks for different styles of music (*e.g.*, Music Television (MTV) and The Nashville Network (TNN)). Channels 1987 Field Guide 73, 81 (Dec. 1986).

96. In the absence of war-time rationing, publishers have access to as much paper to print as many pages in each edition as they desire. Their only real constraint is the price of paper and printing and delivery costs. Cable television system owners are in a similar situation. They can construct or upgrade systems to whatever capacity they are willing to pay for. Even when it is said that there is a limited amount of duct space available underground or a limited amount of capacity on telephone poles, it is always possible for new ducts or telephone poles to be installed, albeit at a very high price. Thus, again, the real constraint is not physical capacity, but economic cost.

Spectrum capacity is also not actually as physically limited as most people think. See sources listed in Nadel, *supra* note 53, at 541 n.62.

97. These are consumers who desire convenience goods. *See supra* note 85.

98. For example, the Food and Drug Administration bans the sale of drugs that are considered to be "imminent hazards." 21 C.F.R. § 2.5 (1986). Individual states ban the provision of professional services by any who do not meet minimum licensing standards. *See* Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93 (1961).

99. Hollywood studios can also use ratings for this purpose. For example, Walt

potentially offensive materials raise different first amendment issues, since they may fall within a category of unprotected speech.[100] But where material falls short of being obscene,[101] other screening services enable editors to protect or warn consumers without entirely excluding the materials. Thus, adult television programs are usually broadcast late in the evening and are often preceded by explicit notices that the material may be offensive to some viewers.[102] Cable television editors have the technological screening tool of the lock-out device by which consumers can ensure that certain channels are not received in their homes.[103] This device allows cable editors to segregate potentially offensive programming onto clearly identified channels for those who desire it, while also protecting those who do not.

(b) *Minimum Quality Standards and Endorsements*

Generally, retailers have minimum quality standards for the products they carry. This permits consumers to shop with confidence. Consumers seeking quality assurances who are unable to rely on brand names may rely on high quality retailers. Retailers may also recommend specific products. A retailer can make its endorsement explicit or subtle, for example, by positioning products in store windows or other less prominent locations. Retailers may also make individualized recommendations based on a customer's known tastes.

While a retailer's reputation for its personal taste and quality

Disney wanted to expand into the production of "R" rated adult films, without damaging its reputation for producing wholesome family films. To maintain its traditional Disney quality standard while also producing films that did not meet those standards, it marketed its new category of films under a different name: Touchstone. *See* Multichannel News, Feb. 27, 1984, at 6, col. 1 By the use of such distinct labeling, Disney has been able to retain its reputation and still offer material that would not meet the former Disney standard.

100. The issue of obscenity and the first amendment questions it raises are beyond the scope of this article.

101. While an exact definition of obscenity is impossible, the Supreme Court has set out a three-part test to use in identifying such materials. *See* Miller v. California, 413 U.S. 15, 24-25 (1973).

102. *See, e.g.*, T. GITLIN, INSIDE PRIME TIME 58 (1983).

103. Thus, section 624 (d)(2)(A) of the 1984 Cable Act, 47 U.S.C. 44 § 624 (d)(2)(A) (1984), states that:

> In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

standards may be one of its most valuable assets,[104] many high quality retailers stop short of excluding all items that do not meet their standards. This is because retailers realize that their reputations need not be compromised by carrying such products if they identify the products clearly. If it is sufficiently profitable to distribute inferior quality goods, such retailers will voluntarily do so, indicating that absolute exclusion is not a necessary component of the screening service which they provide.

Thus, food stores with reputations for fresh food may offer low-priced "day old" products. High class clothing stores may offer carefully marked "imperfects" or "seconds" in a "bargain basement." These retailers recognize that they can retain their reputation and credibility as long as they carefully identify lower quality items as such. Absolute exclusion of such items is unnecessary.

Similarly, consumers of information are often concerned about the quality of available material. They turn to a specific newspaper because they know it carries the highest quality financial information available, or to a specific television channel for credible news reporting.

However, editors, like retailers, need not exclude all material of which they do not approve in order to maintain their quality standards. Newspapers that carefully cultivate reputations for high-quality, objective news also include advertisements, letters-to-the-editor, and guest editorials over which the editors do not exercise the same amount of quality control. Rather, by clearly identifying these materials as the viewpoints of others, newspapers are able to maintain their own quality and editorial standards without excluding the viewpoints of others. Editors also effectively utilize disclaimers to aid consumers of their information.[105] Disclaimers are usually implicit when a medium carries advertisements or letters-to-the- editor. However, there are also explicit disclaimers, including those made in the clos-

104. A retailer's good will is legally recognized as property. *See* Levitt Corp v. Levitt, 593 F.2d 463, 468 (2d Cir. 1979) (citing Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412-13 (1916); Clairol, Inc. v. Asaro, 1975 Trade Cas. ¶ 60, 305 at 66, 473 (E.D. Mich. 1975).

105. In Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 106 S. Ct. 903, 911 n.11 (1986), Justice Powell admitted that "[t]he disclaimer . . . serves . . . to avoid giving readers the mistaken impression that [the access recipient's] words are really those of [the media owner]."

ing credits of certain television programs.[106]

3. *Organizing*

Finally, retailers organize the items they offer. While the serendipity of a flea market is often refreshing,[107] most consumers prefer locating desired products quickly and easily. Therefore, most retailers arrange their items in some logical fashion, for example, by department, size, style, or brand, and may also provide directories.

Editors provide similar organizing services. A sports magazine may place its statistics in the same place in every issue and a fashion magazine may index its beauty tips or fashion features. Classified ads, the yellow pages, and books in a book store are normally organized by subject. When specialized retailers are not affiliated with each other, an independent firm may provide the directory. For example, *TV Guide* and local newspapers identify their choices of the best movies, new television programs, or sporting events for a given day or week.

These services save consumers time and trouble and thereby help consumers receive information effectively. The provision of organizing services should therefore be a protected part of editorial discretion.

4. *Summary*

Editors provide to consumers of messages the same general categories of service that retailers in other markets provide to their customers: (1) searching, gathering, and specializing; (2) evaluating, labeling, and screening; and (3) organizing. Since the first amendment protects the right of consumers to receive information, and consumers require these editorial services to receive information effectively, the first amendment should protect the right of consumers to receive these services from editors and the editorial freedom of editors to provide them.

Editors can provide the editorial services protected by the first amendment without having the right to completely exclude certain messages. The exercise of the editorial functions

106. *The Nightly Business Report*, produced by television station WPBT in Miami and distributed by the Public Broadcasting System (PBS) network, concludes each program with the message that the opinions expressed by its guests are their own and do not necessarily reflect the views of the producers, WPBT, or the station.

107. *See* J. ENGEL, *supra* note 80; P. Rose, *Hers*, N.Y. Times, Apr. 12, 1984 at C2, col. 1. (discussing the fun of shopping in flea markets).

described above diminishes the need for the complete exclusion of undesired, potentially offensive or lower quality materials. Since total exclusion of messages does not help consumers receive information, and exclusion may actually suppress the communication of others, the first amendment should not protect it as part of editorial freedom. Thus, government regulations that prevent media owners from excluding messages should not be held to be unconstitutional abridgements of editorial freedom.

The following section discusses a number of media access regulations that have been challenged as interfering with editorial discretion. The constitutionality of each is evaluated according to whether it hinders the editor's ability to provide any of the editorial services discussed above.

IV
The Constitutionality of Alternative Access Schemes

Editorial freedom is abridged by a regulation only if that regulation hinders the editor's ability to provide one or more of the editorial services discussed above. This framework can be applied to a number of the most significant rules regulating access to the media, including the "must-carry" rules, public and leased (common carrier) access schemes, the fairness doctrine, right-of-reply statutes, and rules mandating exclusive cable franchise awards. These rules have their greatest effect on the specialization and screening services which media owners offer.

The analysis proposed in this article may be relevant to other communications media. However, most of the recent controversy over access regulation involves cable television systems. In discussing the constitutionality of government access schemes, it is helpful to review the editorial services that cable system operators normally provide.

A. The Services Provided by Cable Editors

Cable operators/editors begin by searching through the myriad of national and regional video satellite networks, audio networks, distant broadcast signals, information services, video cassette, and locally produced programming to select the set of messages which they consider most appealing to the specialized

tastes of their local markets.[108] Based on their analyses of products and local market demand, cable operators/editors construct a cable system capable of carrying all the services which they find desirable and economically practical to offer.

Having gathered their chosen program services on their system, cable operators/editors generally provide their subscribers with evaluations, identifications, and recommendations in the form of a cable guide. The guide may be displayed on a channel, but it is usually printed and mailed to subscribers and resembles *TV Guide*. The guide describes the offerings on each channel as well as providing more detailed descriptions and recommendations of particular movies or programs. In the guide, cable operators may suggest that subscribers watch a program or avoid another. They might even describe an adult movie in both ways. For example, "Do not let your children under sixteen see this film, but if you like erotica you should not miss it."

Cable operators provide an organizational service by compiling lists of sporting events, comedy programs, special movies, or other programming offered during a month. Such lists save subscribers from having to peruse the entire monthly program guide themselves.

B. Access Regulations

Specific access rules can now be examined to determine whether they interfere with the protected editorial services provided by cable system operators.

1. *The Must-Carry Rules*

Prior to their repeal in *Quincy Cable TV, Inc. v. FCC*,[109] the FCC's must-carry rules required a cable system owner to carry the signals of all local broadcast stations.[110] The rules thereby

108. *See supra* note 95.

109. 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied* 106 S. Ct. 2889 (1986).

110. The mandatory signal carriage rules were promulgated in First Report and Order, 38 F.C.C. 683, paras. 710-14 (1965) (codified at 47 C.F.R. §§ 76.51-76.65 (1984)). The FCC imposed them out of fear that cable systems would cause such economic harm to broadcasters that the latter would be unable to afford to meet their public service obligations and those not subscribing to cable would be deprived of important information. 38 F.C.C. at 710-14. More recent economic reports, however, have raised some doubts about these conclusions. *See* Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632 (1979) (discussed in Quincy Cable TV v. FCC, 768 F.2d 1434, 1455-59 (1985)).

ensured that local broadcasters had access to cable subscribers. When the rules were challenged, however, the Court of Appeals for the District of Columbia struck them down as violating the first amendment because: (1) the FCC had not demonstrated that the rules served an important or substantial governmental interest;[111] and (2) the rules were not narrowly tailored to impose a restriction no greater than that necessary to further the articulated interest.[112]

While the court was careful to marshal the evidence that justified these conclusions, it was more cursory in its review of how the rules interfered with the first amendment rights of cable operators. It noted only that "[w]e need not decide whether the cable operator's editorial discretion is of the same order as that of a broadcaster or a newspaper . . . . We have no doubt, however, that it is of sufficient magnitude to implicate the First Amendment."[113]

Under the framework proposed here, the former must-carry rules would not appear to interfere with the provision of any editorial service by the cable operator and hence would not abridge the first amendment. The rules would interfere with protected editorial discretion only if they imposed a significant financial burden on those who sought to provide such services. A significant cost could discourage editors from providing editorial services or cause them to increase the price to consumers, thereby depriving some consumers of the higher-priced services.

(a) *Searching, Gathering, and Specializing*

Superficially, the must-carry rules appear to inhibit speciali-

111. 768 F.2d at 1454-59.

112. *Id.* at 1459-62.

113. *Id.* at 1452 n.39 (citation omitted). This was not the first time the Court has had trouble articulating the extent of editorial discretion. As Justice Rehnquist observed in *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 106 S. Ct. 903, 921 (1986) (Rehnquist, J. dissenting):

> In *Miami Herald* . . . the Court extended negative [first amendment] rights to newspapers without much discussion. The Court stated that the right of reply statute . . . "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors." The Court explained that interference with "the exercise of editorial control and judgment" creates a peril for the liberty of the press like government control over "what is to go into a newspaper." The Court did not elaborate further on the justification for its holding.

Id. (citations omitted).

zation. The rules could force a cable editor who desires only to offer a limited amount of specialized cable programming to retransmit a large number of local broadcast stations as well. That requirement could be regarded as an expensive entry barrier which discourages potential specialized editors from entering the industry simply to provide consumers with a few specialized services such as C-SPAN and MTV.[114]

On closer inspection, however, the rules do not appear to represent such a burden because the governmental regulations allow cable operators to earn revenues from providing the must-carry channels. Cable operators can and do charge subscribers for retransmitting the broadcast signals that the must-carry rules require them to carry. In fact, rather than a burden, the retransmission of broadcast stations appears to be a very profitable business for cable operators,[115] due at least in part to the low copyright fees that operators are charged for the use of broadcast programming under the special compulsory license provisions of the copyright law.[116] Where a government regulation requires a cable operator to offer an additional service at a profitable rate, the regulation does not represent an economic burden.

114. The Cable Satellite Public Affairs Network (C-SPAN) covers Congressional and agency hearings as well as other public affairs presentations. The Music TeleVision network (MTV) presents primarily rock music videos.

115. While consumers might not be willing to pay the real cost of carrying less popular UHF stations, the total price that consumers are willing to pay for the entire bundle of must-carry signals appears to make them the most profitable service to provide in many communities. *See* Henry, *The Economics of Pay-TV Media*, in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY 21 (E. Noam ed. 1985) (observing that the sale of retransmitted broadcast signals, with the possible addition of a few advertising-supported cable networks thrown in, together known as "basic" service, is more profitable to cable operators than the sale of individual pay services, such as HBO, Showtime, the Disney Channel, and the Playboy Network). This should not be surprising since the early cable industry designed its pricing to recover all its costs by serving as a retransmitter of local broadcast signals. *See* G. K. WEBB, THE ECONOMICS OF CABLE TELEVISION (1983).

116. 17 U.S.C. § 111 (1976) grants cable operators a compulsory copyright license to retransmit broadcast programs at a regulated rate. Initially, the rate was set artificially low in deference to the economic plight of the cable industry. *See* Hatfield & Garrett, *A Reexamination of Cable Television's Compulsory Licensing Royalty Rates*, 30 J. COPYRIGHT SOC'Y U.S.A. 433, 442-45 (1983). Many commentators consider the benefit that cable operators receive from this provision to be predicated on the must-carry rules. *See* C. FERRIS, F. LLOYD & T. CASEY, CABLE TELEVISION LAW para. 7.12 [8] at 7-49 to 7-54.1 (1986). Thus, immediately after the repeal of the must-carry rules, proposals for the repeal of the compulsory license provisions arose. *See, e.g.*, *Going to war over must carry*, BROADCASTING, 23-28 (July 29, 1985); *Countdown on must carry*, BROADCASTING, 30-34 (Feb. 3, 1986).

If cable operators in fact could show that the must-carry rules did represent an uncompensated economic burden to them,[117] the rules could be found to abridge the first amendment in a number of ways. For example, the rules could represent an unconstitutional discriminatory media tax[118] in violation of the Supreme Court's holding in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*.[119] Imposing additional costs to provide cable services would discourage some cable operators from entering the business. Moreover, even if no editors were discouraged from offering their services to consumers, they would, presumably, pass on the tax to consumers. Thus, some consumers desiring to receive the editors' specialized programming might no longer be able to afford it.

Even under these circumstances, however, the rules could be constitutional if cable system operators are provided with other financial benefits, such as direct payments from the government which should offset the full cost of the must-carry rules. If cable operators are fully compensated for the cost of the rules, the rules would have no effect on the operator's decision to specialize. The rules do not create any further duties which might inhibit operators from selecting particular programs or program services that their customers desire.[120] Even with the

117. A 1984 National Cable Television Association study concluded that the cost of providing public access channels and other regulatory costs amounted to approximately $240 to $340 per subscriber over the life of the franchise. W. SHEW, COSTS OF CABLE TELEVISION FRANCHISE REQUIREMENTS (National Bureau of Economic Research 1984) at 3-4.

118. *See* Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MAN. SCI. 22, 33-34 (1971). To require cable operators to provide public access channels is comparable to requiring theater owners to donate some use of their stage or screen to public purposes—for example, two weeks a year or every other Tuesday, or requiring that all newsstands devote at least eight percent of their shelf space to the distribution of free leaflets written by local residents.

119. 460 U.S. 575 (1983). This ruling was the basis for striking down a tax on subscription fees of Premier Communications, a multipoint distribution service (microwave pay television service), as a discriminatory tax in City of Alameda v. Premier Communications Network, 156 Cal. App. 3d 148, 202 Cal.Rptr. 684 (1 Dist.), *cert. denied*, 105 S. Ct. 567 (1984). *See also* Ripon Cable Co. v. City of Ripon, No. 81-CV-684 (Wisc. Cir. Ct., Fond du Lac County, filed Oct. 12, 1982), *discussed in* CABLE TV L. & FINANCE 4 (Aug. 1984).

120. It would be hard to argue that compelled access for local television stations would "penalize the expression of particular points of view and force [cable operators] to alter their speech to conform with an agenda they do not set" under the standard articulated in Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 106 S. Ct. 903, 908 (1986), since television households would have easy access to local broadcasters' messages under any circumstances.

must-carry rules, cable operators can specialize on as many other channels as they desire without being burdened by other duties related to the must-carry channels.

Cable operators might argue that the must-carry rules create an undue burden for them by forcing them to undertake the expense of adding additional channels, but this is a disingenuous position. The original must-carry rules were promulgated in 1966,[121] well before most cable systems completed their construction or most recent upgrade. Thus, operators have been aware of the number of channels required to retransmit must-carry stations and operators have since had the opportunity to add as many additional channels as desired for their own selected specialized programming. Underestimation of channel needs cannot be attributed to the must-carry rules. For example, if a cable operator wanted to offer eighteen cable services in a community and to reserve six additional channels for possible future needs, it would need at least a twenty-four-channel system. If government access requirements dictated that it carry an additional twelve channels of programming services, it would then build a thirty-six-channel system. If the operator later found that it wanted a twenty-fifth or twenty-sixth channel for its own specialized services, it could not claim that the must-carry rules interfered with its use of the additional channels, since these channels would not have been constructed regardless of the must-carry rules.[122]

One might also consider the must-carry channels from another perspective. Suppose a government body decided to build its own twelve-channel cable system to improve local broadcast television reception for its citizens, just as it might construct a new subway system to improve transportation services. Since the construction of a cable system is extremely costly, requiring streets to be dug up and wires to be strung on telephone lines, it would make economic sense for the government body to negotiate with a private cable franchisee to construct the government system at the same time that it was constructing its private system.

121. *See supra* note 110.

122. As it is only practical to add channel capacity in bundles of multiple channels (*e.g.*, a 12-channel cable), an operator at full capacity, who does not find expansion to be cost effective, may feel that its obligation to carry must-carry stations is preventing it from carrying more desirable channels. Yet this problem is created by the technology, not the must-carry rules.

Moreover, since it is generally more efficient for multiple users to share coaxial cables than to use physically separate cables,[123] it would make economic sense for both the government and the cable operator to share cables. If the government's share of construction costs were covered by the monthly payments made by subscribers for programming carried on the must-carry channels, then the construction of the government channels could be seen as having no effect on the cable operator's ability to satisfy the specialized desires of its subscribers on its channels. This situation is comparable to that created by the must-carry rules. From this perspective it is clear that cable operators actually provide two distinct transmission services: (1) transmission of cable services chosen by the cable operator; and (2) transmission of local broadcast stations under a government contract. Clearly, the governmental requirement need not inhibit the cable operator's discretionary judgments concerning the use of its own channels.

Interestingly, the rules could interfere with the subscriber's right to enjoy specialization (as opposed to the operator's right to specialize) if the rules required subscribers to purchase access to the must-carry channels before they could gain access to the cable operator's specialized set of programs. In fact, the governmentally imposed must-carry rules did not go that far. The requirement to subscribe to receive local stations before being able to buy specialized services, as imposed by most if not all cable systems,[124] is the result of a marketing and organizing choice by cable operators.

(b) *Evaluating, Labeling, and Screening*

The must-carry rules do not prevent cable operators from helping consumers select what to watch and, in particular, what to screen out. As noted above, guides used to provide such judgments are unaffected by the must-carry rules. Not only can editors warn consumers to avoid particular messages scheduled for the must-carry channels, but editors can also recom-

123. It is more efficient to distribute 56 channels over a single one or two coaxial cable system than to build two separate 28 channel systems. The single system permits one to dig ditches or hang wires once rather than twice and permits the sharing of maintenance and other costs. *See* B. OWEN & P. GREENHALGH, COMPETITIVE POLICY CONSIDERATIONS IN CABLE TELEVISION FRANCHISING (Economists, Inc., revised 1984).

124. For a discussion of the tiering strategies of cable operators, see G.K. WEBB, *supra* note 115, at 101-24 (1983).

mend the use of lock boxes for consumers who would like to exclude any or all of the services provided on the must-carry channels.[125] Thus, cable operators can provide a screening service to those subscribers who desire it, while other subscribers can rely on the screening services of the editors of the must-carry stations. Therefore, the must-carry rules do not interfere with the cable subscriber's ability to receive desired evaluations.

(c) *Organizing*

Finally, the must-carry rules do not interfere with the way cable operators organize their programming to help subscribers find the programs they are looking for quickly and easily. The addition of separate must-carry channels in no way affects operators' ability to present any editorial service on the channels they control. They may designate channels as solely for children's programming or sexually suggestive "adult" programming, or they can mix the two.

In summary, assuming that the carriage of must-carry stations imposes no undue or uncompensated economic burden on the cable operator, the must-carry rules do not interfere with an operator's ability to provide editorial services desired by consumers and protected by the first amendment. The must-carry rules do not interfere with a cable operator's ability to select and offer whatever specialized programming consumers prefer, or to evaluate and identify those programs it carries. Nor do the must-carry rules prevent operators from helping subscribers find whatever type of programming those subscribers desire. Thus, under the framework proposed here, must-carry rules need not be unconstitutional as an interference with editorial freedom.

Editors may argue that the must-carry rules violate their freedom of association or their right not to speak[126] by requiring them to carry stations and programs that espouse certain points of view, such as religious, indecent, or violent programming. Editors may charge that economic as well as emotional damage results when they are forced to associate with material which might harm their reputation. Although this point is not frivolous and warrants a more detailed response, the use of disclaimers can eliminate any significant damage to the cable operator's first amendment rights. If disclaimers were not sufficient to eliminate such first amendment infirmities, then governmental regulations requiring telephone companies to act as common carriers (and indirectly associate with the messages of all users—including, for example, dial-a-porn[127] services) would violate the first amendment editorial freedom of those media owners.

125. *See supra* note 103.

126. *See supra* notes 13-14.

The Supreme Court addressed the problem of unwanted association by private property owners with the speech of third parties in *PruneYard Shopping Center v. Robins*.[128] In *PruneYard*, private shopping mall owners argued that the requirement that they permit leafletters on their property violated their right not to speak, as enunciated in *Wooley v. Maynard*.[129] The Court, however, held that, with posted disclaimers, it was unlikely that patrons of the mall would mistake the message of the leafletters for that of the mall owners.

2. *Public Access Channels*

Cable television franchise agreements often require cable operators to offer public access channels as a kind of electronic soap box for the community.[130] Despite congressional authorization,[131] these rules have been subject to a number of first amendment challenges.[132] Under the framework proposed

127. Common carriers are required to "furnish . . . communication service [by wire] upon reasonable request." 47 U.S.C. § 201(a) (1982). Thus, they must provide service to dial-a-porn services. *See* Carlin Communications, Inc. v. FCC (Carlin I), 749 F.2d 113, 120-21 (2d Cir. 1984) and Carlin Communications, Inc. v. FCC (Carlin II), 787 F.2d 848 (2nd Cir. 1986) (finding unconstitutional federal regulations which attempted to restrict, but not prohibit, dial-a-porn).

128. 447 U.S. 74 (1979).

129. *Id.* at 86-87 (discussing Wooley v. Maynard, 430 U.S. 705 (1977)).

130. For a short early history of public access channels, see B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 207-16 (1976); Price & Morris, *Public Access Channels: The New York City Experience*, in SLOAN, *supra* note 36, app. C at 229 (1971). For a more recent update, see K. BECK, CULTIVATING THE WASTELAND (1983).

131. 47 U.S.C. § 531 (1985).

132. *See* Berkshire Cablevision of R.I. v. Burke, 571 F. Supp. 976 (D.R.I. 1983) *vacated as moot*, 773 F.2d 382 (1st Cir. 1985); Connecticut Cable Television Association v. O'Neill (D. Conn., filed Aug. 13, 1984),*cited in* CABLE TELEVISION L. & FINANCE 5 (Oct. 1984). Although section 611 of the Cable Act, 47 U.S.C. § 31 (1984), expressly permits franchising authorities to impose such access requirements, it is not within the power of Congress to determine whether the requirements abridge the first amendment rights of cable operators.

The Supreme Court struck down the cable access rules in *FCC v. Midwest Video Corp.* (*Midwest Video II*), 440 U.S. 689 (1979), but that holding was based on statutory

above, public access channel requirements are similar to the must-carry rules. Public access channel requirements do not interfere with a cable operator's ability to provide consumers with evaluation, labeling, and screening, or organization services, but they may interfere with gathering and specializing services.

The rules may inhibit an operator's ability to offer consumers specialized services for the same economic reason that the must-carry rules might inhibit operators. That is, the public access channel requirement entails the significant costs of constructing and maintaining public access channels.[133] These additional costs may discourage some potential cable editors from entering the industry or discourage some consumers from subscribing to services they otherwise would have been able to afford.

Yet the costs of public access requirements need not necessarily lead to the higher prices which in turn discourage subscribers from subscribing to desired specialized cable services. Some of the costs of public access are recovered by operators in other ways. First, some portion, albeit small, of the revenues that subscribers pay for basic cable service can be allocated to public access channels. Second, the goodwill that the access channels generate may represent a valuable asset to the cable operator.[134]

More significantly, the cost of public access channels may not affect the prices charged by cable operators, but may simply diminish the profits earned by the cable operator. This was the result that the FCC hoped to encourage when it limited the percentage of annual revenues that municipalities could charge cable system operators as an annual franchise fee.[135] The FCC hoped that municipalities would extract any additional franchise fee in the form of innovative public services, particularly public access channels.[136]

grounds. *Id.* at 696-97. The only reference to the first amendment was a footnote observing that the first amendment claims were "not frivolous." *Id.* at 709 n.19.

133. *See supra* note 117.

134. Those in the community who use the public access channels, usually by producing original programming, or watching friends, children, or other local events, are likely to feel good about the cable system operator, encourage others to subscribe to cable, and be among the most vocal and influential when the community decides whether to renew the cable operator's franchise term.

135. *See* Clarification of Cable Rules and Notice of Proposed Rule Making and Inquiry, 46 F.C.C.2d 175, paras. 113-16 at 206 (1974). However, the FCC was interested in protecting cable operators against excessive franchise fees that would "siphon the limited available capital for cable development . . . ." *Id.* at para. 114.

It is unclear whether the first amendment permits the government to charge media owners a substantial license fee to communicate, even if the fee is used to subsidize communication by others. In *Gannett Satellite Information Network, Inc. v. Metropolitan Transit Authority*,[137] the Court of Appeals for the Second Circuit held that a government body could charge a license fee exceeding its actual costs when the service it was licensing was not traditionally provided by the government. It is not clear whether that holding squares with the Supreme Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[138] which prohibits any tax which unjustly discriminates against the press.[139]

If the first amendment permits a municipality to charge a cable system owner a large in-kind franchise fee payable, at least in part, in the form of public access channels, then the public access channel requirement would not interfere with the cable operator's ability to specialize. Public access channels would not interfere with a cable editor's ability to offer consumers a specialized set of channels at regular prices. Since the public access channel requirements do not interfere with the editor's ability to provide either evaluation, labeling, and screening services or organizing services—because, as with the must-carry rules, the cable operator can act freely on as many of its own channels as it likes—the rules would not abridge the editorial discretion protected by the first amendment.

In summary, a public access channel requirement would hinder editorial freedom only if it represents a significant economic burden on cable operators that is not otherwise offset. Even then, however, the harm could be cured if the franchising authority compensated the cable operator for the net cost of public access channels—through a direct payment, an offset of

136. *Id.* at 116-17.

137. 745 F.2d 767 (2d Cir. 1984). The court held that the government could charge a profit-maximizing license fee for the use of publicly owned space, if the space was related to the provision of a service which was traditionally provided by private sector firms which would have been permitted to charge such fees. *Id.* at 774-75.

138. 460 U.S. 575 (1983). The case concerned a special ink tax that permitted newspaper publishers to be taxed at a *lower* rate than the general business tax, from which ink was exempt. *Id.* at 778. Despite the beneficial effect the tax had on publishers, the Court focused only on the point that the ink tax discriminated against newspaper publishers.

139. *Id.* at 593-94.

other valid fees, or by permitting the operator to charge public access users.

3. *Common Carrier Leased Access Structures*

Section 612 of the 1984 Cable Act[140] imposes some common carrier-type obligations on cable operators.[141] The section requires operators of cable systems with more than thirty-five channels to set aside approximately ten to fifteen percent of those channels for the use of unaffiliated program suppliers/editors at reasonable rates.[142]

Although section 612 itself may be difficult, if not close to impossible, to enforce, the leased access concept can be considered in theory. If common carrier or leased access provisions are defined as access regulations that require cable operators to lease some portion of their channels to others at a cost-based access fee, the cable operator retaining no editorial control over the content of those channels, then such provisions would not interfere with protected editorial discretion.[143] Leased access rules would not interfere with the cable operator's ability to provide its separate editorial services any more than the must-carry rules or the public access channel requirements do. The leased access rules would not affect the editorial choices made by the operator for the channels under its own control. Moreover, since access users would pay the full cost of their leased access channels, the leased access rules, by definition, would

140. 47 U.S.C. § 532 (1985).

141. The Communications Act defines a common carrier as "any person engaged as a common carrier for hire . . . ." 47 U.S.C. § 153(h)(1982). Originally common carrier regulations were imposed on any business which held itself out to serve the general public, apparently in response to a finding of market power in an essential service. *See* Deregulation of Telecommunications Services, Further Notice of Proposed Rule Making, 84 F.C.C.2d 445, app. B at paras. 1-47 (1981).

Under a common carrier model, cable operators would be required to "hold themselves out to serve all comers," 47 U.S.C. § 153 (1982), as must telephone common carriers. Thus, any program supplier willing to pay the cable operator's announced tariff would have to be carried. A partial common carrier model requires cable operators to act as common carriers for some of its channels.

142. *See* 47 U.S.C. § 532 (1982). The provision requires that such cable systems take the number of channels which they have activated, subtract the number of channels being used to satisfy other government regulations (*e.g.*, the must-carry rules or public access rules), and designate 10 to 15 percent of the remaining channels for commercial leased (i.e., common carrier) access.

143. This author has proposed such a common carrier scheme, and it would not require rate regulation. *See* Nadel, *COMCAR: A Marketplace Cable Television Franchise Structure*, 20 HARV. J. ON LEG. 541, 561 (1983).

not place the same economic burdens on the operator as might the must-carry rules or public access channel requirements.

In summary, the ability of cable operators to provide editorial services to consumers is not hindered by the must-carry rules, the public access channel requirements, or the leased access provisions. Nonetheless, the first two would not survive first amendment scrutiny if they represented economic burdens to cable operators. Leased access provisions, which entail no economic burden on the cable operator, on the other hand, are inherently consistent with the first amendment.

More importantly, if leased access channels are available in sufficient quantity to satisfy demand, they ensure that editors other than the cable franchisee are also able to provide consumers with editorial services. The availability of such channels protects the editorial discretion protected by the first amendment in its broadest sense.

4. *The Fairness Doctrine*

Among the public interest obligations imposed on broadcasters are the two duties dictated by the fairness doctrine.[144] A licensee must: (1) devote a reasonable amount of its programming to controversial issues of public importance; and (2) provide a balanced presentation of contrasting viewpoints on these issues.[145] The political editorializing rule, a corollary regulation, requires broadcasters who endorse or oppose political candidates to offer reasonable time for responses by opposing candidates.[146] Since the first part of the fairness doctrine duty—devoting a reasonable amount of time to important public issues—is almost never enforced,[147] the focus here will be on

144. For a detailed discussion of the evolution of the fairness doctrine, see Notice of Inquiry, 49 Fed. Reg. 20,317, 20,319-22 (May 14, 1984); S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA (1978). For a discussion of the application of the doctrine to cable television, see Amendment of the Commission's Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, Notice of Proposed Rule Making in Docket No. 83-381, FCC 83-130, 48 Fed. Reg. 26,472 (1983).

145. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969); Report on the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Report, 48 F.C.C.2d 1 (1974).

146. *See* 47 C.F.R. § 73.1930 (1984).

147. *See, e.g.*, Chamberlin, *The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion*, 31 FED. COMM. L.J. 361 (1979); Comment, *Enforcing the Obligation to Present Controversial Issues: the Forgotten Half of the Fairness Doctrine*, 10 HARV. C.R.-C.L. L. REV. 137 (1975).

the balance requirement.

The balance requirement has been severely criticized by broadcasters and commentators alike for creating a chilling effect on editorial expression and discretion.[148] It clearly abridges protected editorial discretion under the analysis above. One need go no further than to observe that the fairness doctrine inhibits broadcasters'/editors' abilities to specialize—to present some of the specialized viewpoints that they might consider most interesting to their audiences—for fear of violating the doctrine or losing their license or, more likely, of having to spend significant time and money to produce opposing programming or to litigate charges of violating the doctrine.

Although the Supreme Court found that such fears were merely speculative when it upheld the fairness doctrine in *Red Lion Broadcasting Co. v. FCC*,[149] the FCC recently documented a number of instances where the fairness doctrine did inhibit the broadcast of particular messages.[150] In addition, many broadcast editors are reluctant to broadcast issue-oriented commercials or to endorse candidates[151] because the fairness doctrine imposes a duty on them to adequately present the other side at the broadcaster's own expense.[152]

148. *See supra* note 33. *But see* Steir, *The Struggle for TV's First Amendment Rights*, VIEW 39 (Jan. 1984) (reporting that, according to an informal survey of group-owned stations, the doctrine did not appear to have any significant chilling effects in practice).

149. 395 U.S. 367, 393 (1969). Nevertheless, the court did not find that the chilling effect of a right-of-reply statute was too speculative to recognize when it decided *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

150. *See* Fairness Doctrine Report, 102 F.C.C.2d 143, at paras. 39-64 (1985). Meanwhile, the Supreme Court has hinted that it would accept a decision by legislators or regulators to repeal the doctrine. *See* FCC v. League of Women Voters, 468 U.S. 364, 376-78 nn.11 & 12 (1984).

151. According to a study by the National Association of Broadcasters (NAB), only three percent of stations endorse candidates and only 45 percent reported editorializing in any form since 1980. *See* NAB, Motion for Leave to File Supplemental Comments in Petition for Rule Making to Repeal and/or Modify the Personal Attack and Political Editorializing Rules, RM-3739 (Jan. 10, 1983), *cited in* F. ROWAN, *supra* note 30, at 147; Fairness Doctrine Inquiry, Report and Order, 74 F.C.C.2d 163, para. 33 (1979) ("few broadcasters routinely accept paid editorial advertisements"); F. ROWAN, *supra* note 30, at 154-55; Lee, *The Problems of "Reasonable Access" to Broadcasting for Noncommercial Expression: Content Discrimination, Appellate Review, and Separation of Commercial and Noncommercial Expression*, 34 U. FLA. L. REV. 348, 348-53 (1982).

152. Broadcasters must offer free time to opposing parties who cannot afford to pay for it. *Cullman Broadcasting Co., Inc.*, 40 F.C.C. 576 (1963). As one witness before the House Communications Subcommittee explained, the right to editorialize, when tied to an obligation to provide equal time, was really no right at all. *See Hearings on H.R. 3333 before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce*, 96th Cong., 1st Sess., Vol II, Pt.1 at 555 (1979), *cited in* Kokalis, *Updating the Communications Act: New Electronics, Old Economics, and the Demise of the Public Interest*, 3 COMM/ENT L.J. 455, 495-96 n.250 (1981). The Supreme Court upheld the right of broadcasters to refuse paid editorial ads in certain circumstances. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 131-33 (1973).

In fact, the FCC almost never second guesses the discretionary judgments of broadcasters on questions of balance.[153] Still, rather than risk being taken to court, most broadcasters simply refuse to grant access to advertisers presenting controversial messages and avoid producing or broadcasting controversial programming themselves.[154] Hence, the fairness doctrine clearly interferes with the ability of broadcast editors to offer specialized programming to audiences.

The fairness doctrine does not prevent broadcasters from evaluating and labeling materials to aid consumers. Broadcasters may editorialize to identify their own position on issues,[155] labeling opposing viewpoints as editorial replies. Alternatively, they may refrain from comment or issue disclaimers concerning issues about which they prefer to keep their views private. But the fairness doctrine may interfere with broadcasters' abilities to protect their audiences from programming that might be found offensive by some, by excluding it.

For example, ardent Zionists cannot be sure that they will not be confronted by programming sympathetic to the Palestinian Liberation Organization (PLO) when they turn on their television sets, and devout Christian Fundamentalists cannot be sure that they will not hear discussions about homosexual life-

153. In Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Supreme Court held that a broadcaster is allowed "significant journalistic discretion" in deciding how to fulfill its obligations under the fairness doctrine. *Id.* at 111. Thus, the Commission has stated that: "Unless clearly unreasonable, editorial decisions [concerning obligations under the fairness doctrine] will not be disturbed." *In re* Energy Action Committee, Inc., Memorandum Opinion and Order, 64 F.C.C.2d 787, para. 35 at 797 (1977). In fact, according to two longtime FCC observers: "When petitioners have alleged a station hasn't not been meeting its public service obligations in programming, but no question of racial discrimination has been raised, the Commission usually cites its philosophy of leaving program judgments to the licensee's discretion." B. COLE & M. OETTINGER, RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE 220 (1978). Of 10,301 fairness doctrine complaints received by the FCC in 1980, the agency found cause in only 28 to even ask broadcasters to respond, and only six led to admonitions against the stations. F. ROWAN, *supra* note 30, at 51, 92 (1984). Nevertheless, informal efforts to secure enforcement appear to be effective. *Id.* at 71-88.

154. *See supra* note 150.

155. Even public broadcasters are entitled to editorialize, FCC v. League of Women Voters, 468 U.S. 364 (1984).

styles when they turn on their radios. Although some audience members might prefer to rely on a broadcast editor to screen out undesirable material, broadcasters cannot guarantee that their entire program schedule will be free of messages potentially offensive to some. Thus, some particularly sensitive consumers may avoid the broadcast media altogether.

Yet the doctrine does not interfere with a broadcaster's or a cablecaster's ability to provide a type of screening service by carefully scheduling programs. The fairness doctrine does not require that all viewpoints on an issue be presented in each program;[156] a broadcaster can present one viewpoint on one evening and another opinion on a different night with explicit warnings for viewers who might prefer to avoid one or both programs. Even with the protections of carefully written programming guides and lock out devices, the danger still exists that children or adults might accidentally hear or view such offensive programming. That danger, however, could be regarded as one of the costs of having a strong first amendment.

Thus, even where broadcast or cable editors can protect their audiences from undesired and offensive messages by scheduling and warnings, the fairness doctrine nevertheless hinders their ability to present specialized editorial services because of the cost and uncertainty of ensuring adequate balance. The doctrine also may require a broadcaster or cable operator to present a viewpoint that it would otherwise wish to exclude. While this abridgement of the first amendment might be tolerable if no less burdensome alternatives existed, the existence of the less drastic leased access/common carrier structure discussed above[157] suggests that the fairness doctrine is unacceptably restrictive.

5. *Right-of-Reply Statutes*

For reasons that include the encouragement of balanced debate, many countries have imposed access regulations which require publishers to grant a right of reply to those attacked in published stories.[158] While the system appears to work adequately in those countries,[159] the Florida version of that law was voided by a unanimous Supreme Court in *Miami Herald Publishing Co. v. Tornillo*.[160] The Supreme Court held that the Florida right-of-reply statute was unconstitutional because it "exacts a penalty on the basis of the content of a newspaper,"[161] and threatens to "dampe[n] the vigor and limi[t] the variety of public debate."[162] Right-of-reply statutes have also been struck down in other state courts.[163]

Under the analysis proposed above, a right-of-reply statute has almost the identical effect on editorial freedom as does the fairness doctrine. It can inhibit editors from providing consumers with specializing and screening services.[164] It discourages editors from presenting controversial stories because of the po-

156. *See* Democratic Nat'l Comm. v. FCC, 717 F.2d 1471 (D.C. Cir. 1983); American Security Council, Memorandum Opinion and Order, 94 F.C.C.2d 521, 521-22 (1983); Public Media Center, Memorandum Opinion and Order, 59 F.C.C.2d 494, 512 (1976), *remanded*, 587 F.2d 1322 (D.C. Cir. 1978), *on remand* 72 F.C.C.2d 776 (1979).

157. *See supra* note 143 and text accompanying notes 140-43.

158. Since the enactment of art. 13 of the Law of July 29, 1881, a "right of response" has been available in France for persons who believe that their reputations have been injured by a statement in the written press. The people mentioned in a news article are the sole judges of whether they have been injured, and they can require a newspaper to print their response to the defamatory language. Meyerson, *The Pursuit of Pluralism: Lessons of the New French Audiovisual Communications Law*, 21 STAN. INTL L.J. 95, 108 nn. 99-100 (1985) (citing Toulemon, *Le Droit de Reponse et la Television*, LA GAZETTE DU PALAIS-DOCTRINE 393, 394 (1975)). *See also* PRESS LAW IN MODERN DEMOCRACIES 214, 248-49, 293 (P. Lahav ed. 1985) (discussing the right of reply in Germany, Sweden, and Israel, respectively).

159. The importance of this right is so well accepted in France that one commentator described it as "the principle that has long been recognized as necessary for the protection of public and private liberty." Bouissou, Le State de L'Office de Radiodiffusion-Television Francaise (ORTF), 80 R.D.P. 1109, 1196 (1964). It has been hailed as "an excellent law which established a reasonable balance between the freedom of thought and the rights of others." Toulemon, *supra* note 158, at 393.

In 1972, a more narrowly drawn right of response was extended to radio and television. Art. 8 of the Law of July 3, 1972. The ground rules for it were laid out in Decree No. 75-341 of May 13, 1975. *See* Meyerson, *supra* note 158.

160. 418 U.S. 241, 258 (1974). *See* FLA. STAT. § 104.38 (1982) (repealed 1975).

161. *Tornillo*, 418 U.S. at 256.

162. *Id.* at 257 (quoting New York Times v. Sullivan, 376 U.S. 254, 279 (1964)). *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 n.82 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

163. Recently, an Ohio retraction statute was struck down on constitutional grounds. Beacon Journal v. Landsdowne, 11 Media L. Rptr. 1094, 1096 (Ohio Ct. of Common Pleas 1984). Earlier, "a Mississippi right-of-reply statute, MISS. CODE ANN. § 3175 (1942) (now MISS. CODE ANN. § 23-3-35 (1972)), was essentially overturned in Manasco v. Walley, 216 Miss. 614, 63 So.2d 91 (1953). In 1969, Nevada repealed its right-of-reply statute, Law of April 14, 1969, ch. 310, § 10 (1969), repealing NEV. REV. STAT. § 200.570 (1963)." Bollinger, *Freedom of the Press and Public Access: Toward A Theory of Partial Regulation of the Mass Media*, 75 U. MICH. L. REV. 1, 3 n.10, 18 n.57 (1976) (Code section 23-3-35 has since been repealed by 1986 MISS. LAWS ch. 495, § 333).

164. This flaw could be remedied, however, by modifying the law to grant a paid right of reply. *See, e.g., supra* notes 140-43 and accompanying text (discussing common carriers).

distribution systems need not inhibit their ability to communicate any more than the government-granted monopolies in first-class mail delivery[173] and local telephone service[174] interfere with the free expression of those who use the mail or telephones. Cable subscribers could still receive the specialized programming offered by any editor who desired to make such programming available.

Unsuccessful franchise applicants who lease channels could also evaluate and identify programming for subscribers without owning or controlling a system as a whole. After evaluating all of the programming carried on the cable system, the unsuccessful applicant could recommend specific programming as well as warn consumers about channels or particularly offensive programs to avoid. The unsuccessful applicant could communicate these evaluations and identifications to subscribers via separate cable channels, newspapers, competing cable guide magazines, newsletters, radio, television, or even telephone.

Using those same media, unsuccessful franchise applicants could also offer organizing services to consumers by helping them locate desired programs quickly and easily. Competing editors could tell subscribers exactly where and when to find the best programs for children, working women, sports enthusiasts, senior citizens, or those hungry for financial data.

The award of an exclusive cable franchise, then, need not abridge the rights of consumers to utilize the editorial services of unsuccessful cable franchise applicants. Evaluation, labeling, and screening services, and organizational services can be provided to consumers efficiently where adequate access rules ensure that consumers are able to receive the programs recommended by editors other than those with exclusive franchises. Adequate access for unsuccessful cable applicants would give subscribers the opportunity to consider the opinions of multiple competing cable editors.

173. *See* 18 U.S.C. § 1696 (1982); 39 U.S.C. §§ 601, 604 (1982). *See also* National Ass'n of Letter Carriers v. Independent Postal Sys. of America, Inc., 470 F.2d 265 (10th Cir. 1972).

174. *See* 47 U.S.C. § 203(c) (1982). *See also* Capital Tel. Co. v. City of Schenectady, 560 F. Supp. 207 (N.D.N.Y. 1983).

V
Conclusion

Editorial freedom is best understood as the right of consumers to receive those editorial/retail services which enable them to receive messages effectively. It is the right of viewers and listeners to receive messages which is paramount. An examination of the role of editors in the marketplace indicates that they provide consumers with three particularly valuable and important editorial services: (1) searching, gathering, and specializing; (2) evaluating, labeling, and screening; and (3) organizing messages. Therefore, in protecting the rights of information consumers, the first amendment right of editorial freedom should protect the rights of editors who offer these services.

Under this framework of analysis, both the fairness doctrine and right-of-reply statutes abridge editorial freedom because they hinder the ability of editors to specialize according to the desires of consumers, and may hinder efforts to screen out offensive messages. The must-carry rules and public access channel requirements may also interfere with protected editorial discretion when they impose an economic burden on cable operators seeking to specialize. Absent such an economic burden, they would not interfere with editorial freedom.

Exclusive cable franchise licenses interfere with the ability of unsuccessful franchise applicants to exercise the editorial discretion protected by the first amendment, unless those applicants are guaranteed an adequate right of access at cost-based prices. The only way of ensuring adequate access is to require cable system owners to provide enough leased access channels to satisfy market demand as under a common carrier structure. Such a duty would neither hinder the efforts of cable operators to offer any of the editorial services protected by the first amendment's editorial freedom nor would it prevent consumers from receiving additional editorial services from editors who do not have cable franchise licenses. Rather, it would ensure that access to the cable television medium is available on the same basis as that of the print medium.